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No. 107.

Brief for Deft in Error

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# Supreme Court of the United States.

OCTOBER TERM, 1902.

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PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, DEFENDANT IN ERROR.

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IN ERROR TO THE SUPREME COURT OF TEXAS.

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## BRIEF FOR DEFENDANT IN ERROR.

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**As to the jurisdiction of this Court:**

Defendant in error has filed a motion to dismiss on the ground that this court has not jurisdiction, and with such motion a brief and argument in support thereof.

On page 33 of the printed brief of counsel for plaintiff in error it is said:

"Now we understand the principle of law to be that if the judgment of the State court gives no effect to subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

In order to bring this case within the jurisdiction of

this court it is then said, following the foregoing statement:

"Now it is true that the Supreme Court of Texas in its first opinion refers to the amending Act of 1899 only once to show the true meaning of the Act of 1897 and the change which was intended to be made by the Act of 1899, and places its decision in its last opinion distinctly on the ground that no contract existed between plaintiff in error and the State, notwithstanding his compliance with all the requirements of the statute. But at the same time it would appear to be equally clear that the judgment of the Supreme Court of Texas under its last opinion gives effect to the subsequent statute—a retroactive effect—whereby plaintiff in error's contract was violated, and it has been repeatedly held by this court that in reviewing the judgment of a State court it is not limited to a mere consideration of the language used in the opinion of the State court, but may examine and determine what is the real substance and effect of the decision, and should this court find that the effect of such decision is to give such force to subsequent legislation as to impair contracts made under former legislation, then a Federal question in presented, of which this court will take jurisdiction."

This is the statement of the whole case of plaintiff in error on the point of the jurisdiction of this court. An analysis of it affords a complete answer to it.

The applications to purchase of plaintiff in error were made under the provisions of that section of the Act of 1897 which reads as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated

and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter."

The contention of plaintiff in error was that this statute required the Commissioner of the General Land Office to sell isolated or detached sections and parts of sections, whether agricultural, grazing or timber land to any applicant to purchase the same, at one dollar per acre, of which one-fortieth was to be paid in cash, and the obligation of the purchaser given for the payment of the balance in annual installments of one-fortieth.

It was further his contention that this was a positive command of the statute, which left the Land Commissioner no discretion; that his duty to accept the applications to purchase of plaintiff in error was a mere ministerial duty, the performance of which should be compelled by the Supreme Court by writ of mandamus.

In the first opinion the Supreme Court agreed with these contentions of plaintiff in error and awarded the writ of mandamus.

A rehearing having been granted, after reargument the Supreme Court reversed this ruling and adopted an entirely different construction of this statute, holding that the statute did not require or command the Commissioner to sell isolated sections at one dollar per acre without actual settlement, but only authorized him to do so, leaving him a discretion to accept or reject the applications to purchase.

It necessarily follows from this construction of the terms of the statute that such isolated sections "may be sold," etc.; that the applications of plaintiff in error to purchase, not accepted by the Land Commissioner, did not constitute contracts of purchase and sale between himself and the State.

The Legislature, at its session in 1899, amended the section of the Act of 1897, hereinabove quoted, so as to read as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for

the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement; but such lands shall be held for settlement and sold to actual settlers only under the provisions of this chapter; and all surveys and fractions of surveys in all counties organized prior to the first day of January, 1875, which surveys are isolated and detached from other surveyed school lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than one dollar per acre, upon the same terms as other public lands are sold under the provisions of chapter 129 of the Acts of 1897."

It will be seen that the only change material to the question involved made in the Act of 1897 was to substitute for the terms "at one dollar per acre" the terms "at not less than one dollar per acre."

The Supreme Court in its first opinion granting the mandamus refers to this Act of 1899 as furnishing a reason for the construction of the Act of 1897 under which the applications were made.

In the second opinion and judgment refusing the mandamus no reference whatever is made to this later Act of 1899.

The second opinion and judgment are based entirely, as were the first, upon the section of the Act of 1897, to which, without reference to the later act, the Court gave a construction adverse to the claims and contentions of plaintiff in error.

No effect was given—in the very nature of things no effect could have been given—to the Act of 1899 in deciding this case.

The contention, then, of plaintiff in error on page 33 of his brief, that "the judgment of the Supreme Court under its last opinion, gives effect to the subsequent statute—a retroactive effect—whereby plaintiff's in error contract was violated," is not supported by the record; on the contrary is distinctly contradicted by both the opinions of the Supreme Court, and especially the opinion adverse to him which is here appealed from.

If the Court had given any force or effect whatever to the Act of 1899 in deciding the case, there would have been no need for construction of the Act of 1897. No argument would have been necessary to show that the Land Commissioner had a discretion to fix the price at any sum not less than one dollar per acre, under the Act of 1899, and a right to refuse to sell to plaintiff in error, unless the price offered, in his application, was satisfactory.

If the Court had intended to give any effect whatever to the Act of 1899, a mere reference to the terms of that act would have been a sufficient answer to the claim of plaintiff in error.

On the contrary, in the judgment and opinion appealed from, the court reviews, briefly, the entire previous legislation upon the subject, and arrives at the conclusions—

1. That if relator had the absolute right to purchase the timbered sections under the Act of 1897 for one dollar per acre, he could only perfect his right by tendering the entire purchase money in cash which he had not done.

2. That the word "may," as used in the act, merely conferred a power upon the Commissioner to sell the lands therein specified at one dollar per acre, and did not make it obligatory upon him to do so.

Of course, if the statute did not make it obligatory upon the Commissioner to sell at the price offered, the applications of plaintiff in error to buy at that price could not have constituted a contract between himself and the State.

Thus we see that it is clear that no effect whatever was given to the subsequent legislation embodied in the Act of 1899 herein quoted, and as plaintiff in error rests his whole claim of the jurisdiction of this court upon the opposite contention, such claim cannot be sustained.

The facts of this case do not bring it within the rule laid down in McCullough vs. Virginia, 172 U. S., and Houston & Texas Central R. R. Co. vs. Texas, 177 U. S., cited by counsel for plaintiff in error, but do bring it clearly within the rule annonnecd by this court in Central Land Co. vs. Laidley, 159 U. S., 103-109-110.

In connection with this statement of counsel above referred to, on page 33 of this brief, it is significant that when they come to discuss the opinion of the Supreme Court and the judgment refusing the writ of mandamus, no reference whatever, in their argument, is made to the Act of 1899, but the entire discussion turns upon what is alleged by counsel to be the erroneous interpretation, by the court, of Art. 4218y in the Act of 1897 under which the applications were made.

The entire argument upon the merits of the case shows conclusively that the ruling of the Supreme Court of Texas rested upon its construction of the Act of 1897, without reference to any subsequent legislation.

Indeed, the printed brief and argument of counsel for plaintiff in error, upon the proposition that plaintiff in error was entitled to the writ of mandamus, and that the Supreme Court of Texas erred in its judgment refusing the writ, affords a sufficient and conclusive answer to the statement on page 33, upon which alone counsel rest their plea that this court has jurisdiction, that the Supreme Court of Texas, in its judgment, gave effect to the subsequent Act of 1899.

## II.

**Should this court follow the construction placed by the Supreme Court of the State upon the section of the Act of 1897 under which the applications were made?**

On page 37 of the brief of plaintiff in error counsel say:

"While it is undoubtedly the general rule of this court to accept the construction placed by the court of a State upon its statutes, yet one exception to this rule has always been recognized, and that is in reference to the matter of contracts alleged to have been impaired."

If this court should hold that there is presented here a question of the impairment of a contract by any law of the State of Texas, which gives this court jurisdiction and brings the case within the one exception to the general rule of this court to accept the construction placed by the court of a State upon its own statutes, it will then

devolve upon this court to determine what was meant by the Legislature of the State in providing, by the Act of 1897, that "all sections and fractions of sections * * * isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this act."

In interpreting this provision the court will find it necessary to take into consideration, not only the entire article of the statute in which this provision is made, but this entire act and all other previous legislation upon this subject. And it will be necessary further, in order to arrive at the intention of the Legislature, as expressed in the act, to take into consideration the nature and characteristics of the particular subject of this legislation.

All of these matters were considered by the Supreme Court of Texas, and had to be considered, in arriving at a just and proper conclusion as to the legislative intent.

In this view, we do not think that we can do better than to quote the language used by this court in its opinion in the late case of Wilson vs. Standifer:

"But as the general rule is," says Mr. Justice Shiras, speaking for the court, "that the interpretation put on a State Constitution or laws by the Supreme Court of such State is binding upon this court, and as our right to review and revise decisions of the State courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the State court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power, or relating to the State's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special

function is to expound and interpret the State enactments." (Wilson vs. Standifer, 184 U. S., 309–412.)

## III.

**The Supreme Court of Texas correctly construed the statute (Art. 4218y, Revised Statutes of 1895, as amended by the Act of 1897), in holding that under this law the Land Commissioner was not required to sell isolated sections of land at the price and on the terms prescribed, but was only authorized to do so, and was vested with a discretion to sell or not to sell.**

In announcing the conclusion arrived at, the Supreme Court in the opinion says:

"For these reasons the majority of the court are of the opinion that the word 'may' in Article 4218y of the Revised Statutes ought to be construed in its literal sense—that is to say, as a word merely conferring a power upon the Commissioner to sell the lands therein specified at one dollar per acre, and not making it obligatory on him to do so."

The reasoning of the court in the opinion leading to this conclusion, based upon the language of the particular article of the statute in the light of the general legislation upon the subject, the general history of such legislation in this State, and the nature of the subject matter of the particular legislation, might be cited as a sufficient answer to every statement and argument advanced by counsel for plaintiff in error upon this point.

Isolated and detached sections of school land were sections which did not at any point in their boundaries join or touch other public lands—that is, other lands belonging to the State. These were never at any time a fixed quantity, nor was the status of isolation fixed. By the sale of other adjoining sections any section might become at any time an isolated and detached section. On the other hand, by the forfeiture of adjoining sections previously sold, and reclaimed by the State, under the provisions of the statute for default in the payment of the interest, or failure to comply with the laws as to three

years occupancy, a section isolated at one time might become attached to another section of public land, losing its status as isolated. This process was, in fact, continually going on.

The Land Commissioner was required by the provisions of section 3 of the Act of 1895 (which is still the law), "from time to time, as the public interest may require, cause any or all of the lands belonging to the several funds mentioned in this act, to be carefully and skillfully classified and valued that have not heretofore been classified and valued."

It was his duty to do this with reference to isolated sections as well as others, by the plain terms of the law, and for the reason that he could not tell when he would be called upon by a change in its status to deal with a section hitherto isolated as not isolated. An additional reason was that isolated sections were subject to be leased, as well as other sections. The law provided (Art. 4218r, Revised Statutes) that agricultural lands and lands having permanent water on them should be leased for a term of five years or less, and dry grazing lands for not more than ten years.

A great many, probably the greater portion, of the isolated sections referred to in the statute have become, under the process before referred to, isolated after they had been properly classified and valued.

It will readily be seen, therefore, that the Commissioner had official knowledge of the classification, whether agricultural, grazing or timbered of each isolated or detached section, and that the legislature in vesting him with the discretion to sell these lands, under the provision that they "may be sold, etc.," assumed that he had official as well as actual knowledge of the classification and value of the lands described, and intended that he should exercise the power conferred upon him, in the light of his knowledge of the value and character of the lands.

Under the provisions of the Acts of 1887 and 1895 with regard to isolated sections the Commissioner was authorized to sell "*at not less than two dollars per acre.*"

Although no difference was made in the *minimum* price

based upon the classification of such lands, as grazing or agricultural (or timbered if timbered lands were intended to be included) nevertheless in fixing the price the Commissioner was necessarily required to have some knowledge of the character and value of the different sections.

The classification required did not have reference solely to their character as agricultural, grazing or timber lands, but had reference also to all of the various elements which could affect the value, as will be seen by reference to Sections 3 and 4 of the Act of 1895 (on pages 58 and 59, brief of plaintiff in error), which is substantially the same as the provisions on this subject in the Act of 1887, and was not changed by the Act of 1897.

Counsel for plaintiff in error insist that for the reason that, no provision having been made by which the Commissioner could be officially advised of the value of isolated sections, therefore it was not intended by the legislature to confer upon him any discretion as to the price. The premise is incorrect and the conclusion fails.

Counsel refer (on pp. 52 and 53 of their brief) to the cases of Eastin vs. Ferguson, 4 C. A., 643, and Cameron vs. State 7 C. A., 37, as instances of sales for prices *fixed by law.* The law under which these sales were made did not purport to fix the price, but only a minimum of two dollars per acre, and the sales *had been actually made by the Commissioner, at a valuation fixed by him under the law.*

There is nothing in either these two cases or Thomas vs. Wolfe, 16 C. A., 22, or Shaver vs. Tinsley, id., 369, to sustain the contention of plaintiff in error. In each of these cases sales of isolated sections *had been actually made* by the Commissioner without actual settlement which were attacked, in one case by the State and in the other three by subsequent applicants to purchase, mainly on the ground that the lands so sold were not in fact isolated sections, and the Commissioner was not authorized to sell except to actual settlers.

"The point at issue in this case; whether the Commissioner was only *authorized* to sell, or was *required* to sell without discretion, at the price; was not raised, and necessarily could not have been raised or decided, in either

case." It is to be noted that Mr. Justice Williams who delivered the opinions in Eastin vs. Ferguson and Thomas vs. Wolfe referred to the brief of plaintiff in error was a Justice of the Supreme Court by which the case at bar was decided and with Mr. Justice Brown constituted the majority of the court referred to by the Chief Justice in the opinion.

It has been held in several cases decided by our courts of Civil Appeals (but not directly in any case by our Supreme Court) that an application to buy school lands generally, as an actual settler, made in full compliance with every requirement of the statute conferred title upon the applicant, regardless of the action of the Land Commissioner in accepting or rejecting his application.

These cases were all upon a statute essentially different in its language and provisions from that under which the applications of plaintiff in error were made.

These decisions rest upon the provisions of section 9 of the Act of 1895 and a similar provision of the Act of 1887 (pp. 60-63, brief of plaintiff in error). This section prescribes very particularly the conditions of sales to actual settlers, the form of the application, etc., and concludes as follows:

"The purchaser shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office."

As conclusively showing that these provisions were not intended to apply to or control sales of isolated sec-

tions under section 26 of the Act, and section 22 of the Act of 1887, the applicant is required to transmit to the Treasurer one-fortieth of the purchase price and to the Land Commissioner his obligation binding him to pay the State on the first day of November of each year thereafter until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at five per cent.; and also his affidavit as prescribed, showing actual settlement, which being done the sale was thereby perfected.

These provisions could not have been intended to apply to sales of isolated sections which did not require any affidavit of actual settlement, etc., and as such sales were to be made "on such terms as the Commissioner may prescribe," the amount of cash to be paid, and the terms as to time of payment of the obligation, could not be known until these were fixed by the Commissioner.

We think it is clear that, having provided generally for the sale of lands to actual settlers, fixing the time and conditions of such sales, and making the sale effective by the filing of the application and obligation and the payment of the installment of purchase money required to be paid in cash without action of the Land Commissioner, except to file the papers, the Legislature then authorized the Land Commissioner, in his discretion, to sell isolated sections without actual settlement, and on such terms as he might prescribe, except as to the price, which could not be less than two dollars per acre under the Acts of 1887 and 1895, and one dollar per acre under the Act of 1897.

If the Commissioner was to have a discretion to sell or not to sell at the price offered, it mattered little, in fact nothing at all, that by the Act of 1897 the price was named at one dollar per acre.

On page 48 of brief for plaintiff in error occurs the following statement:

"But by the general appreciation of lands all over the State, resulting from high prices of all agricultural, ranch and dairy products, and the increase in the price of lumber, even these remnants of lands known as isolated and

detached sections, increased in price, and the Legislature, when it met in 1899, promptly repealed the Act of 1897, by which these lands could be sold at one dollar per acre."

Reference to the Act of 1899 will show that the Legislature did not repeal the section of the Act of 1897 (Art. 4218y) referred to by which these lands could be sold at one dollar per acre.

These lands could as readily be sold for one dollar per acre under the Act of 1899 as under the Act of 1897. The only amendment or change in the statute was to make clear and beyond dispute that the one dollar per acre was not the fixed price, but that the Land Commissioner might refuse to sell at that price, and demand a higher price, if in his discretion it was proper to do so.

The Land Commissioner had, in fact, been construing this Act of 1897 as giving him this discretion, but as the language of the Act of 1897 and the change from "not less than two dollars per acre" to "one dollar per acre" was liable to raise a question as to its proper construction, the amendment by the Act of 1899 was suggested to the Legislature by the Commissioner of the General Land Office himself and for this reason only. (See letter of Land Commissioner to the Attorney General appended to this brief.)

That the general "appreciation of lands all over the State, resulting from high prices of all agricultural, ranch and dairy products, and the increase in the price of lumber," had nothing to do with the amendment of 1899 is sufficiently shown by the fact that the Legislature made no change, and has made none since the Act of 1897, in the minimum price of agricultural, grazing or timbered lands, or in timber upon timbered lands.

The emergency clause of the Act of 1899 really shows that the Legislature did not give to the Act of 1897 the construction here contended for, but gave as the reason for the passage of the act that "the present law *would seem to prevent* the sale of them for more than one dollar per acre, *except in case of voluntary offer*."

There is nothing in the emergency clause to support the contention of counsel (on p. 44 of their brief) that the

Legislature construed the Act of 1897 as *requiring* the Commissioner to sell isolated sections at one dollar per acre. As a matter of fact, the Commissioner had not so construed it, nor was it ever contended that such was the proper construction of the act until this emergency clause of the Act of 1899 gave the hint that the act "would seem" to be susceptible of such construction.

The authority of Smisson vs. The State, 71 T. R., 222, was insisted upon in the State court and is insisted upon here.

It may be said that its value as authority for the contention of plaintiff in error in this case is destroyed by the decision of the same court herein.

An examination of that case, however, shows that it could never have been considered as an authoritative decision of the point involved in this case.

In the Smisson case the Land Board created by the Act of 1883, under the provision of that statute, which declared that "pasture lands * * * may be leased * * * for not less than four cents per acre," undertook to fix a minimum price at one time at eight cents, at another six cents for dry sections, and at twenty cents for watered sections.

The court, in effect, held that the board had no authority, by any regulation of its own, to change the minimum price fixed by the Legislature, but were required to lease at four cents, if no higher price was obtainable, quoting and italicizing for emphasis the following mandatory language of the act:

"There shall be and is hereby created a State Land Board * * * *who shall exercise the powers and perform the duties hereinafter prescribed.*"

From this language and the general context of the entire act the court arrived at the conclusion that the language "may lease at not less than four cents per acre" required the board to lease at that price, if no higher rent could be had, the case really turning, however, upon the power of the Land Board to fix a higher minimum rental, by their own regulations, than that fixed by the law. Whether the word "may" is to be construed as "shall," a

word of command, instead of a word of permission, its usual signification, is to be determined, according to the opinion of the court, in all cases from the context of the act—that is, according to the legislative intent to be gathered from the entire act.

Counsel make the same mistake in their argument that was made by the Supreme Court in its first opinion in treating isolated and detached sections of land as a fixed quantity, and ignoring the process daily going on, by which isolated sections are becoming attached and attached sections becoming isolated and detached from other public lands.

Referring to the Act of 1897 (on page 48 of brief), inadvertently, no doubt, counsel make the statement that "The law is emphatic and unambiguous in its declaration that all isolated and detached sections and fractions of sections *shall* be sold at one dollar per acre."

The language of the act, in fact is, that such sections *may be sold* at one dollar per acre. This language cannot be said to convey an emphatic and unambiguous command to the Land Commissioner to sell at that price. The Land Commissioner did not construe the language as mandatory, but as permissive. This practical construction of the act by that department of the State government, whose duty it was to administer the law, under the settled rule of the construction of statutes, is entitled to great weight in any case and in a doubtful case, or where the language of the act is susceptible of the interpretation given it, is conclusive upon the courts.

Pennoyer vs. McConnaughy, 140 U. S., 1.

United States vs. Moore, 95 U. S., 760.

U. S. vs. Alabama, etc., R. R., 142 U. S., 621.

That this construction was placed upon the act by the Land Commissioner is sufficiently shown by the record, in his refusal to accept the applications of plaintiff in error in this case, for the reason, in case of the timbered section, that it was valued at eight dollars per acre (Record p. 8), and the grazing half section, that it was valued at two dollars per acre. (Record p. 11.)

For further evidence as to this construction we refer

to the letters of the Land Commissioner attached to the brief of respondent, in the Supreme Court, upon the motion for rehearing, and which we have taken the liberty of appending to this brief

## IV.

**So far as the timbered section is concerned, the mandamus was properly refused by the Supreme Court of the State for the reason that plaintiff in error did not comply with the law upon any construction of it, in that he did not tender the purchase price in cash as required in sales of timbered lands.**

The Act of 1897 under which the applications were made authorized the sale of isolated sections at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

Section 9 of the Act of 1895 (p. 63 of brief of plaintiff in error, last clause of the section), after providing for the payment of one-fortieth of the purchase price of lands sold and execution of obligation for the balance, provides as follows: "Provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase."

It may be remarked that ever since the Act of 1883 timbered lands have been sold only for cash.

So that, if the Commissioner was required without discretion to accept an application to purchase an isolated section of timbered land at one dollar per acre, clearly the applicant was only allowed to buy on the same terms as other timbered lands were sold, that is, for cash, and his application not having been accompanied by a payment to the Treasurer of the entire purchase price in cash, was properly refused by the Land Commissioner, as held by the Supreme Court.

It does not matter that the Commissioner based his rejection of the application on other grounds. (Willoughby vs. Townsend, 93 Texas, 82.) Counsel for plaintiff in error insist, it is true, that this cannot be the law, because the Land Commissioner had no means of knowing,

officially, that this was a timbered section, but we think that we have shown that that position is not tenable.

V.

**The law with regard to the sale of isolated and detached sections was not intended to apply to timbered land.**

Reviewing the entire legislation upon this subject, in the light of known prevailing conditions of the subject matter of the legislation under discussion, the Supreme Court of Texas concluded that the statute providing for the sale of isolated and detached sections was not intended to apply to timbered lands, but only to lands classed as grazing or agricultural.

Detached sections of agricultural and grazing lands in counties organized prior to the first day of January, 1875, that is, in all of the older counties (except El Paso, Pecos and Presidio) might very well have been supposed by the Legislature to be of small value, not desirable for settlement and not readily saleable except for a low price and without the condition of actual settlement. That this was not the conditions with regard to timbered lands belonging to the school fund, was a matter of common knowledge.

It appeared that the isolated timbered section involved in this case had been valued at eight dollars per acre. (Answer of Respondent Rogan, Record, p. 5.) It must be understood, only land that was chiefly valuable for the timber thereon was classified as timbered land. It is hardly conceivable that the Legislature should have intended that lands chiefly valuable for the timber thereon should have been sold for one dollar per acre.

We have taken the liberty of appending to this brief copies of two letters from the Commissioner of the General Land Office, one addressed to the Attorney General and the other to the Governor of the State, and which were attached to the printed argument of the Attorney General on the motion for rehearing in the Supreme Court in this case. We submit that they may, with propriety, be considered by this Court, as they were by the

State Supreme Court, as conveying some idea of the condition and value of the isolated sections of timbered lands belonging to the free school fund of the State. The Legislature could not have been ignorant of these conditions, and this gives force to our contention that all timbered lands, whether detached or otherwise, were to be sold under the special provision with regard to such lands, and not otherwise. These letters were written after the first decision by the Supreme Court.

Summing up the argument for defendant in error, we respectfully submit to the Court:

1. There is no Federal question involved to give this Court jurisdiction, and the motion to dismiss should be sustained.

2. If this Court has jurisdiction, the question being as to the construction of a statute of Texas relating to the sale of her public lands, the construction placed upon such statute by the Supreme Court of the State should be accepted.

3. If this Court concludes that it has jurisdiction; independently of the authority of the decision of the State Court, the mandamus prayed for should be refused,

(a) Because by the use of the word "may" in the statute under discussion, the Legislature intended to authorize the Land Commissioner to sell isolated and detached sections of land at one dollar per acre, leaving it to his discretion to sell at that price or to refuse to sell.

(b) Because the statute in question was intended to apply to agricultural and grazing lands alone and not to timbered lands.

(c) Because, as to the timbered section, the applicant was entitled to buy only upon payment to the Treasurer of the entire purchase price in cash, failing in which his application was properly rejected by the Land Commissioner.

C. K. Bell

Attorney General of Texas,
Attorney for Charles Rogan, Commissioner of the General Land Office, Defendant in Error.

## APPENDIX.

### Letter of Commissioner General Land Office Referred to in Brief.

*Hon. T. S. Smith, Attorney-General, Austin, Texas.*

DEAR SIR: Having carefully read the opinion of the Supreme Court in the case of P. O. Weber against myself as Commissioner of the General Land Office, and being strongly impressed with the opinion that the court has erred in arriving at its conclusions, I respectfully request you to file with the court in said cause a motion for a rehearing.

My reasons for this belief are given below:

The law under which the relator bases his right to purchase the most valuable lands in the State belonging to the public school fund at one dollar per acre, was passed in 1897, and is as follows:

Article 4218y. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

The question arises, what land did the Legislature intend to authorize the Commissioner to sell? What was the intention of the Legislature by the passage of that section? Was it the intention of the Legislature to deprive the Commissioner of all discretion in selling lands that should become isolated and detached by reason of having

made sales of other lands adjoining them and without any regard to their value, or however shocking to the conscience; or did it intend by the use of the word "may" to lodge with him some discretion, so that the public interest could be protected in making or refusing sales? It will be observed that this section is an amendment to Section 26 of the Act of 1895.

To determine these questions it is necessary to look: 1. To the Legislature and its surroundings. 2. To the topography of the country and to the location of the public school lands and their value. 3. To the general and local knowledge of the several members of the law-making body of the location and value of the public school lands, their accessibility to the Commissioner of the Land Office for information, and to the records of the office showing the location and value of such lands. 4. To Sections 7, 9, 16 and 26 of the Act of 1895; Section 22 of the Act of 1887, and Sections 4218h, 4218s and 4218y of the Act of 1897.

The several members of the law-making body represent every section of the State, and must be deemed and held to know the condition, location and the value of the public free school lands. All bills introduced into the Legislature are referred to the proper committees for investigation and consideration. Being public officers, the law will presume the committees fully informed themselves as well as the Legislature with regard to the subject matter and of the results that are likely to follow the passage of any bill affecting the public interest. I think it is also safe to presume that the Legislature being representatives of the people, in passing laws governing the disposition, sale and lease of the public free school lands, did so with a view of promoting the public interest instead of subserving the interest of a few speculators.

It was evidently the intention of the Legislature not to impair but to build up the permanent school fund. It is a fund in which every man, woman and child in the State has an interest.

In 1895 the Legislature passed a general land bill in lieu of all other laws regulating the disposition, sale and

lease of the public free school lands, and especially prescribing the manner of sales and terms of sale of timber, and of land valuable chiefly for the timber thereon.

When the Acts of 1887, 1895 and the amendments of 1897 were enacted, what were the conditions and what did the Legislature know? It must have known at the time the several bills were being considered that in nearly every county in the State the public school fund owned some lands, but that the great body of its lands is situated in the pineries of East Texas and on the plains of West Texas. It knew that thousands of acres in West Texas, so far as agricultural and grazing purposes are considered are absolutely worthless, and, for such purposes, can never be sold. It knew that in many of the older counties of the State nearly all of the public school lands of any value had been sold; that those remaining unsold, although classed as such, were not desirable for either grazing or agricultural purposes; that they were isolated and detached from other public school lands, and that neither the State nor the available school fund were deriving any benefit therefrom. It further knew that the most valuable lands in the State, belonging to the school fund, lie in the pineries of East Texas, timbered with both short and long leaf pine on which the stumpage would run from 3,000 to 12,000 feet of choice lumber to the acre, worth from seventy-five cents to one dollar per thousand feet, or from two to twelve dollars per acre; that many of these sections were isolated and detached from similar sections in the same counties, and that the records of the Land Office disclosed these facts. The Legislature, for the purpose of encouraging settlement and the utilization of the school lands so as to make them revenue producing, and at the same time and in the same Act authorizing the sale of isolated and detached tracts of land, passed laws to that effect. It also at the same time provided for the lease of all agricultural and grazing lands, but it made no provision for the leasing of timber land.

There must have been some good reason for this.

Among others, the Act of 1895 contained the following provisions:

Section 7. All lands belonging to the public free schools and the several asylum funds shall be sold at not less than two dollars per acre, except pasture lands, which shall be sold at not less than one dollar per acre, and all timber lands shall be sold at not less than five dollars per acre. By timber lands as here used is meant lands valuable chiefly for the timber thereon.

Section 9. All sales shall be made by the Commissioner of the General Land Office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office, within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy, as provided herein. Any person desiring to purchase land in accordance with the provisions of this act shall forward his application to the Commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land as a home, and has in good faith settled thereon, except where otherwise provided herein. and he shall also swear

that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right after this act goes into effect, or after the land is again placed on the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, that when any forfeiture has been made, the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. Any original purchaser or his vendee of any of the lands, the sale of which is provided for in this act, who has improved such land as a home, and who has been forced to temporarily abandon same on account of drouth and who shall in good faith reoccupy the same, either by themselves or vendees, within six months after this act goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy: provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have reoccupied the land as a home in good faith, and that they had abandoned the same since their purchase on account of the drouth and not otherwise; and such absence shall not be deducted from the three years occupancy required by law in making final proof of occupancy; and provided further, that any purchaser or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases, shall have six months after this act shall take effect to make such proof of occupancy as required by the provisions of this act. The purchaser

shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State, on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office; provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase.

Section 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of such sections, at its proper value; provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications, to be made by the Land Commissioner; provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which the timber so purchased is situated, at two dollars per acre, cash, at any time before

the expiration of five years from date of purchase of timber under the provisions of this act.

Section 17. The public lands and all lands referred to in the several funds mentioned in this act, shall be leased by the Commissioner of the General Land Office under the provisions of this act. All lands classified as agricultural and all lands containing permanent water thereon, shall be leased for a term of five years or less, at not less than three cents per acre per annum, and all lands classified as pasture or dry grazing lands shall be leased for a term of not more than ten years, at not less than two cents per acre per annum, which rental shall be paid yearly in advance, the first payment to be made at the time the lease contract is entered into. If at the termination of any lease the lands covered thereby are still for lease, the lessee thereof shall have the preference right to again lease such lands theretofore leased by him upon the same terms and at the prices then fixed by law. * * *

Section 26. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for purposes of settlement; and no agricultural lands shall be leased if in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except a corporation, without settlement, at not less than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe.

The Twenty-fifth Legislature, in 1897, amended the Act of 1895. Article 4218h, amending Section 7, reads:

All agricultural lands belonging to the public free school and the several asylum funds, shall be sold at not less than one dollar and fifty cents per acre; and all grazing lands shall be sold at not less than one dollar per acre; and all timbered lands shall be sold at not less than five dollars per acre. By timbered lands is meant lands

valuable chiefly for the timber thereon. Provided, that the owner of land, which is in fact agricultural, purchased under former laws, and which land is not subject to forfeiture at the time this law goes into effect, shall not be permitted, in case said land is forfeited, to purchase said forfeited land from the State for a less price per acre than the contract price under the former sale.

Article 4218s, amending Section 18, reads: * * * All land which may be leased, shall be subject to sale at any time, except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made, as well as those hereafter to be made. Any section or part of a section, which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof during the term of his lease, in the following cases:

1. When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement.

2. When he has placed on such section or part of a section improvements of the value of two hundred dollars.

3. When the aggregate of the land owned by a settler and leased by him does not exceed one section.

Any lands which may be leased south and west of the line herein designated, shall not be sold during the term of the lease until otherwise provided by law; provided, the sections leased by any one party are not so selected as to detach sections which are thereby left unleased. * * *

Article 4218y, relating to the sale of isolated and detached lands, amending Section 26, reads:

Article 4218y. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all

counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

It will be observed that Section 16, of the Act of 1895, relating to the sale of lands valuable chiefly for the timber thereon, was not amended by the Act of 1897.

In 1899, upon a suggestion originating in the Land Office, to the effect that while the Commissioner had uniformly construed Article 4218y as giving him full discretion in the matter of making sales of isolated and detached land, that it might be susceptible to a double construction; and, at his instance, the article was amended by the Twenty-sixth Legislature. That Legislature in its zeal to rectify the vice in the Amendment of 1897, if in fact there was any vice at all, put the following language in the emergency clause, towit:

"SEC. 2. The fact that a great deal of the lands mentioned herein are valuable, and the present law would seem to prevent the sale of them for more than $1.00 per acre, except in cases of voluntary offer, to the detriment of the school fund, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

This language attracted the attention, when published in the press, of land agents and speculators, who immediately began the investment of the Land Office. The records of the Land Office show that from the time the language above quoted from the emergency clause of the Act of 1899 up to the 26th day of August of that year, one agent alone filed for various speculators 158 applications to purchase isolated and detached sections of land for the sum of one dollar per acre, on forty years time, at three per cent. interest. The records show that many of these sections are worth and are valued at from one to

ten dollars per acre. The total value of the lands sought to be purchased under these applications, in the counties of Angelina, Sabine, San Augustine, Jefferson, Chambers, Fort Bend, Wharton, Jasper and Tyler alone, aggregates $175,803. If the Commissioner is deprived of all discretion in the premises, every foot of this land must be sold at one dollar per acre, on forty years time, at three per cent. interest, upon the payment of one-fortieth of the principal, or $16 per section, into the treasury. To acquire full control and possession of these lands, the applicants are required to pay into the treasury in the aggregate the paltry sum of only $2,528. After once acquiring possession, the applicants have the power to continue the payment of interest on their purchases until they can sell the valuable timber thereon to mill owners, and until they have time to cut and remove the timber therefrom; and as these lands are chiefly valuable for the timber thereon, and many sections are not worth the taxes after the timber is removed, the purchasers having reaped all the benefits to be derived therefrom can, as has often been done in the past, forfeit their purchase back to the State for non-payment of interest, and as many applicants are non-residents and are otherwise wholly irresponsible, the State could never hope to recover more than the applicants themselves see fit to pay.

As before stated, the Legislature must be deemed and held to know these facts and of the consequences of depriving the Commissioner of all discretion in the sale of isolated and detached sections of land.

The question is: What was the intention of the Legislature when it said, in the Act of 1897, that all isolated and detached sections "may be sold to any purchaser," etc.? With the means of knowledge at their command and with the presumption of law that these public officials did their duty by informing themselves of the location, condition, classification and value of the public school lands, did the legislators, in framing and passing the law of 1897, intend to pass a law so direful in its consequences, so disastrous to the permanent and available public school funds, such as that which now confronts

the people of Texas, or did they intend to vest the Commissioner with some discretion in making these sales? Was it the intention of the Legislature, by the passage of Article 4218y of the Act of 1897, amending Section 26 of the Act of 1895, to materially modify or annul Sections 9 and 16 of the Act of 1895, and Article 4218s of the Act of 1897?

Ever since the passage of the Act of 1895, the Commissioner has exercised his discretion, and until the language used in the emergency clause of the Act of 1899 became public, the public, including land agents and lawyers and legislators, have acquiesced in the construction of the Commissioner of Section 26 of the Act of 1895, and article 4218y of the Act of 1897, amending Section 26, that the Commissioner did have the right of discretion.

Acting upon this theory, the Land Office has, from time to time, in cases where a speculator applies to purchase a section as detached and an actual settler on the land also makes application to purchase it, not as detached, but for a home, and if his offer is for a greater or the same price as that offered by the former, his application conforming to the classification and value, as shown on the records of the office, the office has uniformly awarded the land to him who is residing on the land, improved it and desires it for a home; and in all cases where the applications were filed on the same day.

Construing the language of the two sections relating to the sale of isolated and detached lands, and looking to the context of the Act of 1895, and as amended in 1897, the Land Office authorities have uniformly given full weight to the language used by the Legislature in the sections above quoted, relating to the sale and lease of agricultural lands and of the section prescribing the manner and conditions of sale of timber lands, and of the timber thereon.

Section 9, Act of 1895, contains the following provision: "Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right after this act goes into effect, or *after the land is again placed on the market*, to

purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, when any forfeiture has been made, the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase, given herein."

If the construction of the Supreme Court is correct in construing the word "may," in the Act of 1897, the above provision stands as a nullity in all cases where a speculator desires to take advantage of the actual settler by filing his application to purchase the land as detached, as soon as it is forfeited, but before it is again placed on the market, as is the case with the half section involved in the suit of the relator, classified as dry grazing, and valued at $2.50 per acre.

The two tracts of land involved in this suit were applied for by the relator, and suit was brought to obtain the true construction of the law under which his applications were filed, but the number of sections involved will probably amount into the hundreds, as will be shown later on. If the construction of the court is correct, the Land Office will necessarily have to go back several years and cancel sales which have been made under the prior right clause, thereby disturbing great number of titles and homes; reconsider rejected applications to purchase as detached, and make awards thereon. The Commissioner of the General Land Office has also tried to give effect to Article 4218h of the Act of 1897, above quoted, and he has uniformly declined to make sales in all cases where the lessee is in possession and has settled on the premises and erected thereon his residence and substantial improvements for permanent settlement. Also, where he has placed thereon improvements of the value of $200, and also in cases where the aggregate of the land owned

by a settler and leased by the lessee does not exceed one section; and also all lands under lease in what is known as the absolute lease territory. If the court is right in its construction, then what is to become of the people who have made improvements under their respective leases? Perhaps when they leased and put their improvements thereon, the section was not detached. Sales and forfeitures are so constant that lands detached one day may not be the next day, and those not detached one day may be the next day.

The Land Office authorities have also given effect to Section 16 of the Act of 1895, in the sale and classification of pine timber lands.

Since these applications for the purchase of pine timber lands were filed and rejected, the timber from a number of them has been sold and the money paid into the treasury. The timber alone from five sections was sold for $14,995, and the money paid into the permanent school fund. If the court is correct in its construction, the Legislature will have to appropriate the amount from all sales from said fund, and refund it to the purchasers, and the Land Office will then be required to not only sell the timber, but the land also for a cash payment of only $80, and if the land itself is worthless, there is nothing to prevent the purchasers from letting this land forfeit back to the State after they appropriate the timber therefrom. Was it the intention of the Legislature to pass a law so detrimental to the public good, and to place the school lands beyond the power of the Commissioner to protect the fund from the greed of the speculator?

The general law authorizes the sale of public school land on forty years time, but Section 16 of the Act of 1895 expressly excepts the sale of the timber lands, regardless of whether the sections are detached or connected, on any other terms than for cash. Is Article 4218y any more of an exception to the general law than Section 16? An inspection of the map will show that it is no trouble to create detached sections at will, by one who desires to take advantage of the construction given by the court to the law. By the purchase of one or more

sections for cash, he can by proper selection, cause several other to become detached. By so doing, it is plain to see how the value of the school fund can be very materially impaired by the speculator. The Legislature is supposed to have known this. Therefore, can it be presumed that it was the intention of the lawmaking body to pass a law that would place it beyond the power of the Commissoner to protect that fund? In other words, was it not the intention of the Legislature, by the use of the word "may" in that connection, to mean permissive instead of mandatory? If the language is to be construed as mandatory and not merely permissive, does it not defeat the rights of all parties for whom the Legislature intended to give some preference by a prior right to purchase for ninety days after the land is again placed on the market after forfeiture.

Is that not a special statute on that subject? And would not such a construction impair the right to a great number of people guaranteed to them under Article 4218s, which is a special statute on that subject, and a part of the same chapter and act as 4218y. The general law authorizes the leasing of all grazing and agricultural lands, but did not authorize the leasing of timber lands. Why was this? Was it not because the Legislature desired to protect the timber thereon by refusing occupancy and possession? Is not Section 16 such a special statute, relating to the sale and disposition of timbered lands, that in order to affect it by another special statute, that it also applies to isolated and detached sections of timber lands?

The court in its opinion in this case, uses the following language:

"If one had nothing but the language of the article to throw light upon the intention of the Legislature, we would therefore think it would be difficult to say that the word "may" was not used in the same sense in the second instance as it was used in the first. But when we review the history of the provision, the difficulty disappears."

It then proceeds to recite the history, and then says:

"The article so amended took away all discretion as to

the terms of sale, by providing that the sale should be upon the same terms as other public lands are sold *under the provisions of this chapter*," and that "such seems to have been the construction put upon the act by the next Legislature," etc.

"*Under the provisions of this chapter*" What are the provisions of this chapter? Section 9 of the Act of 1895, provides for the sale of all public school lands on forty years time, at three per cent. interest, upon payment of one-fortieth of the principal, and of the execution by the purchaser of his obligation for the payment of the remainder, but in that same section the Legislature expressly excepted timber lands. It says, "provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase." Timber lands are as much public lands as grazing and agricultural lands. Article 4218y says that isolated and detached sections "may be sold * * * without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." The relator in this case offered one dollar per acre for this timber land, and paid only $16—one-fortieth of his offer, when there is a special provision in this chapter requiring the applicant to pay the full amount of the purchase money at the time of his purchase. Has he done so? If not, is it not the duty of the Commissioner to reject his application? But this is not all. There is also another special provision in the same chapter governing the sale of timber lands. Section 16 of the Act of 1895 (Article 4218q, Revised Statutes, 1895), referring especially to timber lands says: "Such timber shall not be sold for less than $5 per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent, appointed by him for that purpose, to be paid by the purchaser," etc. "*Provided*, such timber is sold at not less than $2 per acre." "Provided further, that the purchaser or his vendees of such timber shall have the right to purchase the land upon which timber so purchased is situated, at $2 per acre,

cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act." This is a special provision. Did it except such as are, or may become, isolated and detached? If it was the intention of the Legislature to sell such sections as were or might become detached by the sale of other tracts, is it not reasonable to presume the Legislature would have so expressed itself?

I would respectfully ask that you invite the attention of the court especially to Section 16 of this chapter. Until the timber is first sold, can the land upon which it is situated be sold at all? Before it can be sold, must it not be first put on the market? Does not the language of this particular section preclude the idea that it can be sold before the timber is first sold? After the timber is sold, it may be sold to the purchaser within a given time at $2 per acre, cash, without classification, by a special provision, but not so to any other person. It says: "Provided, that all timbered lands from which the timber has been cut and taken off, may be placed on the market and sold as agricultural or grazing lands, according to classifications, to be made by the Land Commissioner."

It is submitted that at no time could an actual settler ever buy timbered lands for cash, for three reasons: 1. He is required to pay from four to twelve dollars per acre, cash (a great deal more money than a pioneer, who wanted to procure a home for his family, would be likely to have). 2. If it was not accessible to a mill owner, it would cost him about $25 to $30 per acre to destroy the timber and prepare the land for a state of cultivation. 3. Because, the land being valuable chiefly for the timber thereon, would not be worth the payment of the taxes after the timber shall have been removed. Therefore, is not the court in error in adopting the idea that these lands are refused lands, and are remnants, such as an old stock of goods? Was it ever in contemplation of the Legislature that lands valuable chiefly for the timber, should ever be sold for actual settlement, or as grazing lands, until the timber is first removed, so that it could be

classified, put on the market, and sold on long time, as other public lands, under a general law? Was this "the construction put on the act by the Twenty-sixth Legislature?"

Three different Land Commissioners had placed a different construction on it, and their construction uniformly acquiesced in by the public—by all applicants and their agents—until after the emergency clause to the amended act was published. Because it was possible for a different construction, the Legislature, on a suggestion originating in the Land Office, made the change, but did the Legislature place on the Act of 1897 the construction as now contended for by the relator? The language used in the emergency clause is that "the present law *would seem* to prevent," etc. Is not the language only one of doubt? And if so, in its haste to change it, it would admit of such a construction and argument that the Legislature never intended it to have been so construed?

Since the publication of the decision of the court in this case, the Land Office is being overwhelmed with letters, telegrams and applications to purchase this timber land as detached. As many as 29 applications from one man to purchase as many different sections, were received by special delivery in the Land Office within two days after the decision was published.

Very respectfully,

CHARLES ROGAN,
Commissioner General Land Office.

GENERAL LAND OFFICE.
AUSTIN, TEXAS, February 3, 1900.

*His Excellency, Joseph D. Sayers, Governor of Texas:*

DEAR SIR: Your attention is respectfully invited to the wording of Chapter 137, Acts of 1899, being "An Act to amend Article 4218y of Chapter 129, Acts of 1897, providing for the sale of isolated and detached lands."

This act among other things, provides that "all surveys and fractions of surveys in all counties organized prior to the first day of January, 1875, which surveys are

isolated and detached from other school lands, *may* be sold to any purchaser, except to a corporation, without actual settlement, at not *less than one dollar per acre*, upon the same terms as other public lands are sold under the provisions of Chapter 129, Acts of 1897."

The language of the Act of 1897 is identical with that of the act above quoted, with the exception that the Act of 1897 uses the words *"at one dollar per acre,"* while the Act of 1899 uses the words *"at not less than* one dollar per acre."

From the time of the emergency clause of the Act of 1899 was published through the press to the world, and the attention of the public directed to the possible double construction that might be placed on the Act of 1897, until the Act of 1899 went into effect, on the 26th of August of last year, there were filed in the General Land Office, by one agent alone, for numerous speculators, 158 applications to purchase as many isolated and detached sections of land, at one dollar per acre, offering $16 per section, or one-fortieth of the purchase price, and their obligations for the remainder, on forty years time, at three per cent. interest.

The several Commissioners of the General Land Office have uniformly construed the word "may," as used in the Acts of 1895, 1897 and 1899, relating to the sale of isolated and detached sections of school land, to be directory or permissive only, and not used in the same sense as the word "shall."

The Land Office authorities, by construing the word "may," as used in these several acts as meaning, not as an undoubted word of command, but as directory or permissive, have saved to the State permanent school fund many thousands of dollars, but which would have been irretrievably lost to that fund had they placed any other construction on that word.

As previously stated, one gentleman alone, residing in Galveston, for himself and as the agent for many others, during the months of July and August, 1899, filed applications for the purchase of 158 sections of land. As to how many applications were filed by other people during

and prior to that time, I am not informed, but most of these applications were filed on the most valuable timber lands in the State, ranging in value from four to twelve dollars per acre.

Acting upon the theory that the Commissioner had the right to exercise some discretion in the premises, and with an earnest desire to protect the school fund, and for the purpose of giving full effect to other provisions of the Acts of 1895 and 1897, regulating the disposition, sale and lease of the public free school lands, I rejected most of the applications that had been thus filed by them, for several reasons, although one reason only might have been assigned for their rejection, believing one to be sufficient, and I declined to sell thereon for the following reasons, viz.: Because some of them were valuable chiefly for the short and long leaf pine timber situated thereon, classified and valued on the records of the Land Office at from four to twelve dollars per acre; and because Section 16 of the Act of 1895, being a special act regulating the disposition and sale of such timbered lands, without specially excepting isolated and detached sections, provides that such timber lands shall not be sold for a less price than five dollars per acre, cash.

2. Because some of them had been sold prior to that Act (1895), and were forfeited in 1899 for non-payment of interest, and had not been placed again on the market, at the time those applications were filed; and because Section 9 of the Act of 1895 specially provides that "Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days' prior right, *after the land is again placed on the market*, to purchase said land, upon the payment of all interest due thereon at the time of forfeiture," and to make sales on said applications to purchase as detached lands, would deprive all former purchasers, many of whom are actual settlers and have made valuable improvements thereon, of their right under this law to purchase again, in all cases where they may have become detached by the sales of other public lands adjoining them.

3. Because Article 4218s of the Acts of 1897 especially

provides that "Any section or part of a section which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof, during the time of his lease, in the following cases: 1. When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement. 2. When he has placed on such section, or part of a section, improvements of the value of two hundred dollars. 3. When the aggregate of the land owned by a settler and leased by him, does not exceed one section," and because to sell the many sections and parts of sections as isolated and detached, would deprive a great number of people, who have acted in good faith under said statute, of the rights, privileges and possession intended to be vouchsaved to them by said statute.

Acting upon the idea that it was the evident intention of the Legislature to lodge some discretion with the Commissioner of the Land Office, in the sale of isolated and detached lands, and after rejecting said applications, I proceeded to sell the same. First. In accordance with its classification and value, as shown by the records of the office, giving preference to actual settlers, in so far as I believe that I had the authority so to do. Second. To sell the pine timber at its appraised value, and for cash only. Third. And I then declined to make sales altogether where the sections were isolated and detached, and where they were leased and came within the exceptions named in Article 4218s of the Act of 1897, as above quoted.

The value of the land applied for as isolated and detached, by this one gentleman alone, for himself and others, aggregates $175,803.

Of the number of timbered sections applied for, I sold the timber on five sections for the sum of $14,995, cash, and the money has been paid into the permanent school fund.

One of the parties for whom these applications were filed to purchase this land, as isolated and detached sections, at one dollar per acre, on forty years time, after

his applications were rejected, filed, in the Supreme Court, an application for the issuance of a writ of mandamus against myself as Commissioner, to compel me to award said lands to him, on the terms and at the price stated in his application to purchase. There were two tracts involved in the suit; one a pine timbered section, situated in Polk county, and classified as timber and valued at $8 per acre, and the other a tract classified as grazing land, situated in Jefferson county, and valued at $2 per acre. The former tract, according to my construction, could not be sold under Section 16, Act of 1895, for less than $8 per acre, cash, and the other, although it was isolated and detached, I declined to sell for three reasons. First. Because the sum offered was less than its appraised value. Second. Because it had been sold prior to 1895; was forfeited for non-payment of interest on July 20, 1899, but was not placed on the market again until September 1, 1899, and because the applications of the relator were filed in the office before the land was on the market, which, in accordance with previous decisions of the court, was illegal and could not be considered. Third. Because, to make the sale to the relator, would deprive the forfeiting purchaser of the prior right, for ninety days, to purchase the same again, under Section 9 of the Act of 1895, upon the payment of all past due interest.

The Supreme Court, on the application of the relator, P. O. Weber, against myself as Commissioner, directed the writ of mandamus to issue. The court construed the word "may," in the Act of 1897, relating to the sale of isolated and detached lands, as meaning *shall*, an undoubted word of command; that the Legislature had deprived the Commissioner of the Land Office of all discretion in the premises, and that he had no alternative but to sell the land on the application of the relator. With regard to the timbered section, the court held it must be sold at $1 per acre, on forty years time, at three per cent. interest, upon the payment by the relator of one-fortieth of the amount, $16 cash, into the treasury. As to the other tract, the court held it must be sold to the relator, and the fact that it was not on the market at the time the

relator's applications were filed, is immaterial. This, of course, deprived the forfeiting purchaser of his prior right for ninety days to purchase the land again, after it was again put on the market.

If the court adheres to its original opinion, the damage to settlers will be difficult to calculate, while the loss of several thousand dollars to the permanent school fund will be irreparable, because the decision of the court is decisive as to all similar applications, and, if the applicants demand it, might become necessary to take up and reconsider all such applications which have been rejected, but filed in the office during the past four years; cancel other sales, and make awards to those who have applied to purchase them as detached.

In this connection, I beg to inform your Excellency that I have requested the Attorney General to file a motion for a rehearing in said cause, and I have filed with him my reasons, at length, for asking it, and he is now preparing the motion.

As the Act of 1899 made but one amendment to the Act of 1897, and, in view of the present decision, further legislation is very necessary at this particular time, in order to protect the school fund, and to give force to the present law in order to protect former purchasers, actual settlers and lessees.

Very respectfully,

CHARLES ROGAN,
Commissioner General Land Office.